No. 82-1050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET HECKLER,
Appellant
v.
ROBERT H. MATHEWS, ET AL.,
Appellee

On Appeal from the United States District Court for the Northern District of Alabama

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AND JAMES L. OBERSTAR, MEMBER OF CONGRESS, AS AMICI CURIAE

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QUESTION PRESENTED

Whether a statutory exception to a general provision in the Social Security Act that was intended to protect the reliance interests of certain individuals violates the equal protection component of the Due Process Clause of the Fifth Amendment because it incorporates a gender-based classification previously held unconstitutional in a different context.

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36.2, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO (AFGE) and Congressman James L. Oberstar file this brief as amici curiae in support of this appeal by Margaret Heckler, Secretary of Health and Human Services.

INTEREST OF AMICI CURIAE

AFGE is an unincorporated association representing approximately 700,000 civilian employees and retirees of the federal government, including hundreds of members whose entitlement to Social Security spouse benefits is dependent upon this case. AFGE is the largest labor organization of non-postal federal employees including the so-called blue collar, white collar and professional groups of employees located in nearly every major department and agency of the federal government and the government of the District of Columbia.

In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents grievances and complaints, including court actions, and carries on legislative activity to improve the welfare of the employees it represents. AFGE files this brief in support of Public Law 95-216 and joins the United States' contention that the judgment below should be reversed.

James L. Oberstar, a Member of Congress from Minnesota, represents over 500,000 constituents, a significant number of whom have made plans to retire, which it is too late for them to change, in the expectation they would receive both Social Security spouse benefits and public pension. Because Minnesota's public employees are not covered by Social Security as a result of their public employment, an immediate effective date would create a problem for State and local employees in his constituency, as well as for Federal employees.

STATEMENT

Appellee retired from employment with the United States Postal Service on November 18, 1977. His wife had retired from her employment four months earlier and was fully insured under the Social Security Act. 42

U.S.C. § 302 *et seq.*, hereinafter Social Security Act. In December of 1977, Appellee filed an application for husband's insurance benefits based upon his wife's earnings record. In connection with his application for benefits under Section 202(c) of the Social Security Act, 42 U.S.C. § 402(c), Appellee informed the Social Security Administration that as a result of his own employment record he was receiving a civil service pension of $573.00 per month. On March 23, 1978, the Social Security Administration advised the Appellee that although he was entitled to husband's insurance benefits under Section 202(c), the amount of his monthly benefit would be offset dollar-by-dollar by the amount of his civil service retirement pension, in accordance with the provisions of the 1977 amendments to the Social Security Act contained in Section 334 of Pub. L. No. 95-216, 91 Stat. 1509, 1544-47; 42 U.S.C. § 402 (Supp. IV). Because the amount of his pension exceeded the amount of the monthly benefit, Appellee was notified that he would receive no payments from Social Security.

After complying with requirements to seek an administrative remedy, the Appellee appealed the decision of the Social Security Administration on behalf of himself and all others similarly situated. The District Court for the Northern District of Alabama found section 334(g)(1)(B) of the Social Security Amendments of 1977 (91 Stat. 1509, 1546-47, 42 U.S.C. (Supp. IV) 402) (P.L. 95-216), under which the Appellee deemed was subject to the offset and therefore denied payment of a husband's benefit, to be unconstitutional.

It also found unconstitutional the severance clause in section 334(g)(3) of the Social Security Amendments of 1977 (91 Stat. 1509, 1547). Under that clause, if the coverage of the provision delaying the reduction in Social Security benefits for any person should be found invalid,

the delay would be deemed invalid as to everyone and the reduction in the benefits would be immediate for all.[1]

A jurisdictional statement was filed by the Solicitor General of the United States, and this Court agreed to consider the case.

SUMMARY OF ARGUMENT

The delayed effective date of the public pension offset, found in Section 334(g)(1) of P.L. 95-216, is a constitutional act by Congress to protect the reliance interests of public employees facing retirement.

Prior to 1977, the Social Security Act differed in its eligibility standards for husbands and wives. Wives and widows were eligible for spouse benefits whether or not they were dependent on their husbands. Husbands and widowers were eligible for spouse benefits only if they were dependent on their wives at the time of retirement disability or death for half their income (construed to mean they earned less than a quarter of the family income in a two-person household).

This differential was gender-based, and as such, was successfully challenged in several landmark cases. On March 2, 1977 this Court held that the higher eligibility standard for widowers, as compared to widows, was a violation of the Equal Protection Clause of the Due Process provision in the Fifth Amendment. *Califano v. Goldfarb*, 430 U.S. 199 (1977). Three weeks later, the Court summarily affirmed two district court decisions which had struck down the dependency test for husbands of living wives. *Califano v. Silbowitz*, 430 U.S. 924 (1977), and *Jablon v. Califano*, 430 U.S. 924 (1977).

These decisions faced the Congress with a dilemma. If husbands and widowers were to be treated as generously

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[1] This Court also has before it the issue of the validity of the severability clause. Amici believe that the severability clause is invalid.

as wives and widows, the cost would be very great, but the only alternative was to reduce benefits for wives and widows to the level applicable to husbands and widowers.

In considering what to do Congress focused specifically on the cost of providing Social Security benefits to non-dependent husbands with substantial entitlement to public pensions. The reason for this particular concern was that while Social Security benefits for husband and wife are integrated with each other, benefits under other public employment systems may be payable without regard to the recipient's entitlement to a spouse benefit from Social Security.

The method by which Social Security integrates benefits for husband and wife is called the "dual entitlement rule." This rule works by reducing the Social Security spouse benefit to which an individual is entitled by the amount of that individual's entitlement from his or her own earnings.

Faced with the alternative of providing spouse benefits for non-dependent husbands at great expense, Congress decided to deny Social Security spouse benefits to wives and widows with their own public pensions by enacting a "public pension offset" modeled on the dual entitlement rule. The new law provided that individuals who were recipients of a public pension based on their own earnings would be eligible for a Social Security spouse benefit only to the extent the spouse benefit exceeded the public pension unless the public employment was covered by Social Security on the last day of the spouse's public employment.[2] At the same time as it enacted the public pension offset, Congress took steps to protect the reliance interests of persons already retired and those nearing retirement age from an abrupt change in their future benefits.

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[2] See § 334 of the Social Security Amendments of 1977, 91 Stat. 1509, 1544-47, amending sections 202(b), (c), (e), (f), (g) of the Social Security Act, 42 U.S.C. §§ 402(b), (c), (e), (f) (1976) respectively.

ARGUMENT

I. Congress specifically acted to delay the effective date of the public pension offset in order to protect justifiable reliance interests of public employees.

Section 334(g)(1) of P.L. 95-216, delayed the effective date of the public pension offset and protected both persons already retired and those public employees nearing retirement. These two groups were exempted from the impact of the public pension offset, the former by not being covered by the public pension offset, and the latter by the "delayed effective date."[3] The delayed effective date protected from the offset all future payments to those individuals who became eligible for a public pension before December 1, 1982 if they would have been entitled to a full spouse benefit under the law as it existed in January 1977, a month before the *Goldfarb* decision was rendered. Those persons could reasonably have made retirement plans in the expectation of receiving both Social Security and a civil pension.

Denying benefits to the elderly creates greater problems than similar reductions in benefits for the young or middle-aged, because it is likely to be too late for them to earn other retirement income to make up for the reduction. If plans for old age have been made in expectation of a specific level of income, lifetime residences may have been sold and new homes purchased, commitments may have been made to retirement houses, and standards of living may have adopted that cannot easily be changed. In these circumstances, it can be devastating to the individual involved to reduce benefits, requiring abandonment of routines and destroying the very security Social Security was designed to provide.

Moreover, many of the persons likely to be adversely affected by the public pension offset had made previous

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[3] *See* § 334(g)(1)(A) of the Social Security Amendments of 1977, 91 Stat. 1509, 1546, 42 U.S.C. § 402(g)(1)(A) (Supp. V 1981), as amended by Pub. L. 97-455 and Pub. L. 98-21.

employment decisions which might have been different if the public pension offset had been anticipated. For many it would have made more sense to work in the private sector than in the public sector.

One group for whom this is true are women (frequently widows or divorcees) who went to work for a public employer late in life after years as homemakers, expecting to supplement their social security spouse benefits with a public pension. Under the public pension offset, however, the public pension which they earn may not increase their total retirement income, but instead may substantially or totally replace the Social Security spouse benefit they would otherwise receive. If, alternatively, these women had obtained employment with a private employer covered by Social Security, even if their Social Security had remained constant, they could have earned a private pension. The difference is attributable to the fact that the *public pension offset does not distinguish between that portion of a public pension which is a substitute for Social Security and that which is a substitute for a private pension.* Both components serve to reduce the employee's entitlement to Social Security, to the substantial disadvantage of some public employees.

Another group are those for whom the tax laws makes the earning of a public pension unwise. In 1977 Social Security was tax-free.[4] The same is not true of the tax treatment of public pensions. Instead, after the retiree has received back his or her own contributions to the pension fund, the public pension is fully taxable. This means that individuals who receive a public pension in lieu of Social Security may experience an after-tax *decrease* in dollar income. From the perspective of retirement income, therefore, the individual might have been

[4] Even after the Social Security Amendments of 1983, half of everyone's Social Security will remain tax-free, and the other half will be taxed only in the case of recipients with substantial additional income. Section 121 of Pub. L. No. 98-21 (1983).

wiser to choose private employment or even no employment.

A third group who might have made other employment plans are those affected by the difference in the indexing of the two types of plans. Social Security is indexed to inflation, but many state and local plans are not. If the latter have any indexing feature at all (and some do not), their increases may be capped at three or four percent.[6] For those with entitlement to both Social Security and a State or local pension, as inflation proceeds Social Security entitlement will go up, but there may be no increase in the retiree's overall income until such time as the Social Security spouse benefit exceeds the public pension. During the period before that happens, the offset would keep the dollar amount of the combined pensions flat, and the retiree's real income would erode.

This could not happen if the Social Security were supplemented by a private pension instead of a public pension. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1056(b) (1976), private pension plans integrated with Social Security are prohibited from reducing their benefits after the employee retires to balance increases in Social Security. This provision gives the employee the security of knowing that in times of inflation, the Social Security portion of his or her retirement income will keep its real value, and the private pension portion will keep its dollar amount. The private pension can never be reduced as a result of cost of living increases to Social Security.

Thus an individual whose public pension is inadequately indexed might have been better off seeking private employment rather than public employment.

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[6] Bassett, *State and Local Pensions*, in *Coming of Age; Toward A National Retirement Income Policy*, Appendix to Report of the National Commission on Pension Policy, 1981, pp. 595-99, Washington, D.C.

Those who relied on the statute might, therefore, have acted differently both in making their employment choices and in planning their retirement if they had been given timely warning of the public pension offset.

A decision by the Court to invalidate the delayed effective date might destroy the future entitlement of those persons who became eligible for a public pension in the years between 1977 and December 1, 1982. They are 6 years older now, and it would be even more difficult for them to make satisfactory arrangements than it was when Congress enacted the delayed effective date.

II. This Court has previously recognized the importance of the reliance interest of those who anticipate receiving benefits.

In the recent case of *Nachman v. Pension Benefit Guarantee Corporation*, 446 U.S. 359 (1980), this Court dealt with a complex situation involving Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) which guarantees "nonforfeitable" benefits. The plan at issue provided for the vesting of certain benefits but specified that the employer was not liable for funds in excess of the money he had already contributed when the plan terminated. ERISA's vesting requirements had not yet become effective when the plan terminated, so the only basis for deeming the benefits "nonforfeitable" was the plan's provisions. The question was whether the anticipated benefits had vested under the plan, despite the exculpatory clause. If the answer was affirmative, the employer would be responsible under the statute for reimbursing the Pension Benefit Guarantee Corporation for its expenditures in paying guaranteed benefits, up to one-third of the employer's net assets.

This Court held in favor of payment of the anticipated benefits, and in doing so, cited the legislative history of the ERISA. It found that one of Congress' cen-

tral purposes in enacting ERISA had been to prevent the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated. *Id.* at 374. It noted that Congress had acted to "correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has filled whatever conditions are required to obtain a vested benefit—that he actually receive it." *Id.* at 375.

As a consequence of the *Nachman* decision, retroactive liability was attached to an employer despite the exculpatory clause in his pre-ERISA collective bargaining agreement specifically designed to save him from that very source of liability. The decision was reached in a case where the specific application of the statute at issue was ambiguous. Payment to the beneficiaries was held to be required only after the disentanglement of a highly technical set of provisions whose meaning was unclear not only to the lower courts but undoubtedly to many Members of Congress who voted for it.

In the case at hand the equities compelling payment are stronger than in *Nachman*. First, the same Congressional purpose, avoiding great personal tragedy from non-payment of anticipated benefits, is central. It was set forth as follows by the conferees:

> The House recedes [and accepts the public pension offset] with an amendment which would provide for an exception for certain people who are already receiving pensions based on noncovered public employment (or who would be eligible for such pension within 5 years of the month of enactment) and who would have expected to receive social security benefits as dependents or survivors under the social security law as in effect on January 1, 1977. The managers are concerned that there may be large numbers of women, especially widows in their late fifties, who are already drawing pensions, or would

be eligible to draw them within 5 years of the date of enactment of this bill, based on their non-covered work and whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under social security. Inclusion of this exception to the applicability of the Senate provision, reinforces its prospective nature and avoids penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the "offset" provision that will apply in the future.[6]

Second, there is no doubt about the provisions of the statute. No fancy unraveling of complex provisions is necessary to decipher it, such as was required in *Nachman*. Congress understood what it was doing in enacting the specific provisions.

Third, there is not the same potential for harming the innocent in an affirmative decision. No new retroactive burden will fall upon employers. The cost would be borne entirely by the Social Security trust fund out of taxes already determined.

The only damage would be, if the Court decides in favor of payment under the statute and upholds the severability clause, to what James Kilpatrick, in another context, has called "the holy name of equality."[7] The Congress was more concerned about flesh and blood, in our opinion properly so.

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[6] Conference Committee Report, Social Security Amendments of 1977, H.R. Rep. No. 837, 95th Cong., 1st Sess. 72 *reprinted in* 1977 U.S. Code Cong. & Ad. News 4155, 4318. S. Rep. No. 612, 95th Cong., 1st Sess. 72.

[7] Kilpatrick, *Insurance Bills; the Woman Pays*, Washington Post, May 27, 1983, at A21.

III. This limited scope of the delayed effective duty does not offend the Constitution.

The coverage of the delayed effective date shows that it was not motivated by "overbroad generalizations" such as would have been repugnant to the Due Process Clause of the Fifth Amendment.[8]

Congress made the delayed effective date available for persons not yet retired who had reason in January 1977 to expect to receive a Social Security spouse benefit without regard to their entitlement to a public pension. This class was defined as those who would have been entitled under the law as it existed in January 1977, pre-*Goldfarb*, and who became entitled to a public pension during the ensuing five years, ending on December 2, 1982. This class included wives and widows, the only ones who could reasonably have relied on expectations of a Social Security spouse benefit in addition to a public pension. It did not include non-dependent husbands or widowers whose period of entitlement had lasted only the nine months between the *Goldfarb* decision and enactment of the public pension offset. To have given them a five-year window because they had been eligible for nine months would have been to give them a windfall without rational basis.

That the Congress was intending to help only those who had earlier reason to rely on the promised benefits is further demonstrated by its decision not to delay the effective date of the public pension offset for divorced women who were newly eligible to a spouse benefit under the 1977 amendments. Before 1977 Social Security paid divorcees only if their marriages had lasted for 20 years. After 1977, it recognized divorcees after ten year marriages. But the delayed effective date of the public pension offset was applicable to those women who had

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[8] *See Califano v. Goldfarb*, 430 U.S. 199 (1977) and *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

previously been married less than 20 years before divorce. This group had not been relying on a spouse benefit under Social Security, and therefore, had no claim to the delayed effective date. If it were not for the reliance factor, there would be no reason for Congress to have excluded persons divorced after 10 to 20 years from the delayed effective date since the same Congress had reached a concensus to pay them spouse benefits.

The District Court made much of the fact that the Conference Committee Report accompanying the delayed effective date stressed the concern of the "Managers" for the "large numbers of women, especially widows in their late fifties, who are already drawing pensions or would be eligible to draw them within 5 years of the date of enactment of this bill . . . whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under Social Security."

Apparently, in the opinion of the District Court, this phrasing shows gender-based discrimination. In our opinion, it shows a concern with the reality of who was relying on the statute as it existed prior to the Social Security Amendments of 1977. Moreover, whatever their expressed concern, the Congress made the delayed effective date applicable to all who could reasonably have relied upon it for any significant period of time, including dependent husbands. The coverage was not restricted to women.

These careful distinctions in coverage are analogous to those upheld by this Court in *Schlesinger v. Ballard*, 419 U.S. 498 (1975). In that case, the Navy and the Marine Corp provided different standards for selection-out for men and women for whom promotional opportunities differed. In upholding the different gender-based standards, the Court said:

> The complete rationality of this legislative classification is underscored by the fact that in corps where male and female lieutenants are similarly situated,

> Congress has not differentiated between them with respect to time.

419 U.S. at 509.

There is similar rationality in the differentiation between husbands and wives in the delayed effective date.

IV. The delayed effective date established by Congress to protect reliance interests is limited and transitional.

The subsequent history of the delayed effective date and other ameliorations to the public pension offset shows that in enacting the delayed effective date, Congress was concerned to provide a temporary shelter for those individuals who had reason to rely on the pre-*Goldfarb* law, and no others. Only persons who would have become eligible for a public pension under the rules applicable in January 1977 were protected. After December 1, 1982, they were to be subject to the same rules as everyone else. Despite later amendments, Congress has not changed this principle, demonstrating that the delayed effective date was designed to be a transitional amelioration of a potentially harsh change in the law, not a flouting of the Courts' decision that a permanent differential in the treatment men and women was unconstitutional.

The original scheme provided for those members of the protected class who qualified later, whether wives or dependent husbands, widows or dependent widowers, to be fully covered by the public pension offset. However, when the five years expired in 1982, Congress once again considered future treatment of wives and widows. Despite intensive lobbying on behalf of women in public employment, it decided not to delay further the effective date of the offset. Instead, it decided to retain the dependency provisions which had previously governed the eligibility of husbands and widowers, and make them applicable to wives and widows. Those of either sex who were dependent upon their spouses and became eligible for a public pension in the seven months between December 1,

1982 and July 1, 1983, were given entitlement to Social Security spouse benefits.[9] Non-dependent wives and widows were made subject to the offset to the same extent as non-dependent husbands. Divorcees who had been married 10 or more years were subject to the same standards as spouses.

The solution adopted in Pub. L. No. 97-455 (1983) of protecting dependent spouses but ignoring non-dependent spouses was not fully satisfactory to the Congress, and was not continued. Congress did not say in its Committee reports why it dropped the dependency test, but possible reasons are that it provided all-or-nothing relief, and that it gave full benefits to any person whose income was sufficiently disproportionate to that of his or her spouse, without regard to the adequacy of income. Thus an individual whose income was $24,999 married to a $75,000 earner was as fully protected from the offset as one whose earnings were $1,999 married to a spouse with $6,000 in annual income.

Worse, there was no minimum protection for persons with very low income. An individual with a public pension entitlement of $2,000 and a spouse benefit of the same amount who did not meet the dependency test could have half his or her retirement income eliminated.

Congress changed the law once more in the Social Security Amendment of 1983, Pub. L. No. 98-21 (1983), reducing the offset applicable to persons first becoming eligible for a public pension after June 30, 1983 from 100 percent to two-thirds. This means that for every three dollars of public pension to which the individual is entitled based upon his or her own employment, the Social Security spouse benefit will be reduced by two dollars. The entire Social Security benefit will not be eliminated until the individual's public pension is one and a half times the Social Security spouse benefit.

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[9] Section 7 of Pub. L. No. 97-455 (1983).

No distinction is made among the various categories of individuals who are eligible for both Social Security and public pensions. All are subject to the two-thirds offset under the new formula, without regard to sex, dependency, or previous expectations under Social Security.

V. The delayed effective date serves an important governmental purpose.

Because the delayed effective date was carefully crafted to save the members of a particular cohort from a potentially critical loss of retirement benefits they had reason to rely upon, it is constitutional.

The Court has never said that all gender-based differentials whatever their purpose are improper. (Such a rationale would have been the consequence of the Equal Rights Amendment to the Constitution, which did not pass.) Rather, the Court has upheld Congressional power to make gender-based distinctions "if they serve an important governmental objective and [are] substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Saving a cohort of older women (and dependent husbands) from a drastic drop in income as a consequence of a change in the Federal law on which they had previously been entitled to rely is such a purpose.

It is true that Congress might have chosen a different formula for protecting those who had relied on the old statute; perhaps it could have found a better formula. That is, however, a legislative question. The test is not whether the Congressional reasoning was ideal, but rather whether it was "patently arbitrary." *U.S. Railroad Retierment Board v. Fritz*, 449 U.S. 166, 177 (1980). In view of the careful history of Congressional action in enacting the delayed effective date, it cannot be deemed patently arbitrary. "The Constitution requires that Congress treat similarly situated persons similarly, not that

it engage in gestures of superficial equality." *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981). It permits legislation to provide a differential in the treatment of the two sexes if the differential bears a reasonable relationship to the object of the legislation. *Kahn v. Shevin*, 416 U.S. 351 (1974).

The fact that the earlier law which was the basis for reliance was later invalidated does not diminish the reasonableness of the reliance on it of those who were covered, or invalidate Congressional efforts to provide a remedy for it. As the Court said in an analogous case involving reliance on a different law it found invalid, "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it have waived their rights." *Chevron Oil v. Huson*, 404 U.S. 97, 107 (1971) (quoting *Griffin v. Illinois*, 351 U.S. 12, 26 (1956)). In the case at hand, the waiver was of the right to seek alternative private employment or to make plans in anticipation of an old age with less income.

Nor does the delayed effective date fall afoul of strictures against "old notions" or "archaic and overbroad generalizations" about the likelihood of women not to be self-supporting, which led to the *Goldfarb* decision. Rather, this case should be decided favorably to those who would be benefited, in accordance with the principles that underlay *Rostker v. Goldberg*, 453 U.S. 57 (1981), in which the Court upheld mandatory registration for the draft of males but not females. In that case, the Court found the gender-based differential had been carefully thought through by the Congress. It said that "the Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason.'" *Id.* at 72. Its decision "was not the 'accidental byproduct of a traditional way of thinking of females.'" *Id.* at 74 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977) and *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977)).

CONCLUSION

The delayed effective date is Constitutional despite its gender-related coverage. Accordingly, this Court need not reach the severability clause held invalid below.

Respectfully submitted,

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